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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 269

ROBERT G. MEADOWS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

JEAN S. BREITENSTEIN,
Counsel for Petitioner.

S. R. OWENS,
LOWELL D. HUNT,
Of Counsel.

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ROBERT G. MEADOWS, PETITIONER,

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THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner above named respectfully represents:

Statement of Facts.

This is an action brought by Robert G. Meadows, petitioner herein, against the United States to reinstate a lapsed War Risk Insurance policy.

The petition was filed in the United States District Court for the District of Colorado on June 18, 1926.

An amended petition was filed August 21, 1926. It is there alleged that the petitioner served in the United States Army from March 31, 1914, to August 2, 1923, when he was discharged under a surgeon's certificate of disability. During his enlistment a policy for ten thousand ($10,000) dollars of War Risk Insurance was issued to him. About February 1, 1920, he converted three thousand ($3,000) dollars of this policy into a twenty-payment life policy and allowed the remaining seven thousand ($7,000) dollars to lapse. About February 21, 1923, he made a written application for the reinstatement of the seven thousand ($7,000) dollars of the original policy, which had lapsed, and tendered the necessary premiums and interest. The amended petition alleges that in making such application he complied with all the terms of the War Risk Insurance Act and all the rules and regulations of the United States Veterans' Bureau; that at the time of making such application he was suffering from a disability, pulmonary tuberculosis, of a degree less than permanent and total disability; that the Veterans' Bureau erroneously and contrary to the terms of the War Risk Insurance Act rejected and refused his application; that he is entitled to the reinstatement applied for, and is ready and willing to pay all the premiums necessary therefor.

To the amended petition the respondent filed, on January 4, 1927, an answer which denied that the petitioner had complied with all the rules and regulations of the Veterans' Bureau in making his application for reinstatement, and denied that the petitioner was suffering from a disability, pulmonary tuberculosis, of a

degree less than permanent total. The answer affirmatively alleged that the petitioner at the time of the application and at all times since November 28, 1922, was permanently and totally disabled.

Upon trial to the United States District Court for the District of Colorado testimony was presented and the issues joined found in favor of the petitioner and judgment entered for him.

The respondent then took the case to the Circuit Court of Appeals for the Eighth Circuit. Upon motion of the petitioner the bill of exceptions was stricken from the record. The Circuit Court on March 19, 1929, reversed the District Court, holding that that court had no jurisdiction over a controversy of this character. Thereafter a petition for rehearing was filed and overruled on May 28, 1929.

The Circuit Court of Appeals held that the trial court was without jurisdiction of the cause because (1) there was no allegation in the petition that the action of the Director of the Veterans' Bureau in denying the petitioner's application was arbitrary or capricious, and, hence, the action did not come under Section 2 of the Act of 1921, and (2) because the controversy did not involve a claim under a contract of insurance, and, hence, could not be brought within the provision of Section 19 of the Act of 1924.

This petition is accompanied by a certified transcript of the record in the case, including the proceedings of the United States Circuit Court of Appeals for the Eighth Circuit, to which the writ is asked to be directed.

Reasons Relied Upon for Allowance of Writ of Certiorari.

The reasons relied upon for the allowance of this writ are as follows:

(*a*) The decision of the Circuit Court that the trial court was without jurisdiction over the cause for the reason that the petition did not allege that the action of the Director of the Veterans' Bureau in denying petitioner's application was arbitrary or capricious is erroneous because the trial court had general jurisdiction of the parties, and as the respondent did not attack in the trial court the jurisdiction of the court upon this ground, the point was waived and cannot be relied upon in the appellate courts. Such decision presents an important question of Federal law which has not been, but should be, settled by this Court, and is also in conflict with applicable decisions of the Circuit Court of Appeals for the Eighth Circuit.

(*b*) The decision of the Circuit Court of Appeals that the claim of a holder of a War Risk Insurance policy of a right to reinstate a portion of that policy which has lapsed is not a claim under a contract of insurance within the meaning of Section 19 of the War Risk Insurance Act, and, hence, not reviewable by the courts, is an important question of Federal law which has not been, but should be, settled by this Court, and is in conflict with applicable decisions of this Court.

WHEREFORE, because of the importance of the questions involved, and for the reasons hereinabove set forth, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record of the proceedings of that court in this case, which was there entitled "United States of America, plaintiff in error, *v.* Robert G. Meadows, defendant in error, Number 8082," to the end that said cause may be reviewed and determined by this Court as provided in Section 240 of the Judicial Code as amended by the Act of February 13, 1925, and the rules of this Court, and that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and in conformity with the provisions of said Code and the rules of this Court, and that the judgment of the said Circuit Court of Appeals may be reversed by this Court.

ROBERT G. MEADOWS,
Petitioner,
By JEAN S. BREITENSTEIN,
Counsel for Petitioner.

S. R. OWENS,
LOWELL D. HUNT,
Of Counsel.

SUPPORTING BRIEF.

Introduction.

The decision of the United States Circuit Court of Appeals for the Eighth Circuit which the petitioner seeks to have reviewed here by writ of certiorari is reported as "United States of America *v.* Robert G. Meadows," Number 8082, Advance Sheets, Federal Reporter, Second Series, Vol. 32 (2d), No. 2, page 440.

The judgment of the Circuit Court of Appeals in this case was rendered March 19, 1929, but thereafter a petition for rehearing was duly filed. The petition for rehearing was denied May 28, 1929.

The rulings made by the Circuit Court of Appeals which the petitioner seeks to have reversed and upon which he relies as the basis for this Court's jurisdiction are:

1. The court was without jurisdiction to try and determine this cause, because the petition did not allege that the action of the Director of the Veterans' Bureau in denying petitioner's application was arbitrary or capricious, and, hence, the action does not come within Section 2 of the War Risk Insurance Act of 1921 (42 Stat. 148), and

2. The court was without jurisdiction because the controversy did not involve a claim under a contract of insurance, and, hence, could not be brought within the provisions of Section 19 of the Act of 1924 (43 Stat. 1302).

The jurisdiction of the Supreme Court of the United States is invoked in this case under provisions of Section 240 of the Judicial Code as amended by the Act of February 13, 1925. Under that section of the Judicial Code this Court may review all decisions of the circuit courts deciding important questions of Federal law which have not been, but should be, settled by this Court, and also it may review decisions of circuit courts on Federal questions probably in conflict with applicable decisions of this Court.

Statement of the Case.

This is an action for the reinstatement of a lapsed War Risk Insurance policy. The amended petition filed August 21, 1926, alleges that the petitioner served in the United States Army from March 31, 1914, to August 2, 1923, when he was discharged under a physician's certificate of disability. During his enlistment a War Risk Insurance policy in the amount of ten thousand ($10,000) dollars was issued to him. About February 1, 1920, he allowed seven thousand ($7,000) dollars of this to lapse and converted three thousand ($3,000) dollars into a twenty-payment life policy. About February 21, 1923, he made written application for the reinstatement of the seven thousand ($7,000) dollars of the original policy, which had lapsed, and tendered to the Veterans' Bureau the necessary premiums and interest. It is alleged that in making such application the petitioner complied with all the terms

of the War Risk Insurance Act and all the rules and regulations of the United States Veterans' Bureau. That at the time of making such application he was suffering from a disability, pulmonary tuberculosis, of a degree less than permanent and total disability; that the Veterans' Bureau erroneously and contrary to the terms of the War Risk Insurance Act rejected and refused his application; that he is entitled to the reinstatement applied for, and is ready and willing to pay all the premiums necessary therefor.

To the amended petition the respondent filed on January 4, 1927, an answer which denied that the petitioner had complied with all the rules and regulations of the Veterans' Bureau in making his application for reinstatement, and denied that the petitioner was suffering from a disability of a degree less than permanent total. The answer affirmatively alleges that the petitioner at the time of making the application for reinstatement, and at all times since November 28, 1922, was permanently and totally disabled.

The pleadings then presented but one real issue which was whether or not the petitioner was permanently and totally disabled at the time he applied for reinstatement of his lapsed War Risk insurance.

Upon trial to the United States District Court for the District of Colorado testimony was presented and the issues joined found in favor of the petitioner, and judgment was entered for him.

The respondent then took the case by writ of error to the Circuit Court of Appeals for the Eighth Circuit. Upon motion of the petitioner the bill of exceptions

was stricken from the record because it was not filed in time (United States *v.* Meadows, 29 Fed. (2d) 739).

Particular attention is directed to the fact that the record as it now stands shows no objections interposed in the trial court to the jurisdiction of the court to hear and determine the cause. The question was raised merely by the motion for a new trial and assignments of error.

The Circuit Court of Appeals held that the trial court was without jurisdiction over the cause for the reasons that (1) there was no allegation in the petition that the action of the Director of the Veterans' Bureau in denying petitioner's application was arbitrary or capricious, and, hence, the action could not be brought within the terms of Section 2 of the Act of 1921, and (2) the controversy does not involve a claim under a contract of insurance, and, hence, does not fall within the provisions of Section 19 of the Act of 1924. The judgment of the District Court was, of course, reversed. The petition for rehearing was filed, and overruled on May 28, 1929. It is to reverse the judgment of the Circuit Court of Appeals that the petitioner now seeks to have the cause reviewed by this Court upon certiorari.

Points Relied Upon.

As stated in the petition for a writ of certiorari, the reasons upon which the petitioner relies for reversing the judgment are:

(*a*) The decision of the Circuit Court that the trial court was without jurisdiction over the cause for the

reason that the petition did not allege that the action of the Director of the Veterans' Bureau in denying petitioner's application was artribary or capricious is erroneous because the trial court had general jurisdiction of the parties, and as the respondent did not attack in the trial court the jurisdiction of the court upon this ground, the point was waived and cannot be relied upon in the appellate courts. Such decision presents an important question of federal law which has not been, but should be, settled by this Court, and is also in conflict with applicable decisions of this Court, and with other decisions of the Circuit Court of Appeals for the Eighth Circuit.

(*b*) The decision of the Circuit Court of Appeals that the claim of a holder of a War Risk insurance policy of a right to reinstate a portion of that policy which has lapsed is not a claim under a contract of insurance within the meaning of Section 19 of the War Risk Insurance Act, and, hence, not reviewable by the courts, is an important question of federal law which has not been, but should be, settled by this Court, and is in conflict with applicable decisions of this Court.

The argument of the petitioner may be summarized as follows:

1. The respondent has waived the right to question the jurisdiction of the court upon the ground that the petition is defective for failure to allege that the action of the Director of the Veterans' Bureau was arbitrary or capricious.

(*a*) The court had general jurisdiction of the parties;

(*b*) The question was not presented in the trial court.

2. The disagreement between the parties presented by this action is justiciable under the terms of Section 19 of the War Risk Insurance Act, as it presents a claim under a contract of insurance.

(*a*) The right of reinstatement depends upon the provisions of the original contract;

(*b*) The reinstatement under the terms of the original policy continues the old policy and does not create a new one;

(*c*) Decisions of this Court, the lower federal courts, and of the state courts uniformly hold that a claim such as this arises out of the original contract.

Brief of the Argument.

I.

The petitioner first contends that the Circuit Court erred in holding that the trial court was without jurisdiction because the petition did not allege that the action of the Director of the Veterans' Bureau was arbitrary or capricious.

In this connection we first direct attention to the statute providing for the reinstatement of a lapsed portion of a War Risk insurance policy. Section 408 of the Act (42 Stat. 156) reads thus:

"In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with an application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this mandatory Act or cancellation, *provided*, that the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War; *provided further*, that the applicant during his lifetime submits proof satisfactory to the director showing that he is not totally and permanently disabled * * *, the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rate of 5 per centum per annum, compounded annually, * * *."

Section 2 of the Act (42 Stat. 148) is a general grant of power to the Director of the Veterans' Bureau to administer the Act. It provides that:

"The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purpose, and shall decide all questions arising under this Act and all decisions of questions of fact affect-

ing any claimant to the benefits of Titles II, III, or IV of this Act, shall be conclusive except as otherwise provided herein."

We particularly emphasize the point that the respondent by its pleading did not question the jurisdiction of the trial court, and joined issue solely on the proposition of whether or not the petitioner was permanently and totally disabled at the time of his application for reinstatement. This question was tried out, and after a decision adverse to the respondent was rendered, it then in its motion for a new trial and assignments of error advanced the contention that the court was without jurisdiction but did not specifically state, or even hint, that the jurisdictional defect was the failure of the petition to allege that the action of the Director was arbitrary or capricious.

It is true that the petition did not state in so many words that the Director acted arbitrarily or capriciously. It did allege that the petitioner had complied with all the rules and regulations of the Veterans' Bureau, had tendered the necessary premiums, and was not suffering from a permanent and total disability. This is sufficient to bring the application within the terms of Section 408, quoted *supra*, and when the Director denied the application under such circumstances his action was arbitrary. Mere allegations of arbitrariness and capriciousness are legal conclusions and of no effect. (See Silbershein *v.* U. S., 266 U. S. 221, 225.)

Further, if we concede for the sake of argument that the petition is defective in this regard, still the

decision of the Circuit Court should not stand for the respondent by entering upon the trial without raising the issue has waived the point.

It will be conceded, we believe, that the court had general jurisdiction of the cause and subject-matter. Hence this defect, if there is a defect, has been waived by failure to make timely objection under the rule thus announced by the Circuit Court for the Eighth Circuit in U. S. *v.* Edwards, 23 Fed. (2d) 477, 479 *et seq.*, from which we quote:

> "It is conceded that the District Court had general jurisdiction of the parties and of the subject-matter. The jurisdictional question raised is not one which goes to the court as a federal court, but concerns what is termed a condition precedent to the relief sought. In 15 *Corpus Juris,* 845 Par. 164, the rule is thus stated:
>
> " 'An absolute want of jurisdiction of the subject-matter or cause of action cannot be waived, nor can the doctrine of equitable estoppel be invoked to confer a jurisdiction on a tribunal which has not jurisdiction of the subject-matter. But where the court has general jurisdiction of the subject-matter a lack of jurisdiction of the particular case may be waived by failure to take timely and specific objections, or an invocation of or submission to the jurisdiction may raise an estoppel to deny such jurisdiction. So, also, the parties may, either expressly or by their conduct, waive objections to remedies pursued in courts having jurisdiction of the subject-matter.'

"In Beyer *v.* Le Fevre, 186 U. S. 114-118, 22 S. Ct. 765, 767 (46 L. Ed. 1080), Mr. Justice Brewer said:

" 'Whatever might have been the conclusion if the defendants had stood upon their challenge of the jurisdiction, the agreement of the parties to submit certain questions to a jury, the trial before the jury and the stipulation for returning the testimony there taken to the equity court for consideration by the judge thereof, must be held a waiver of the objection to the jurisdiction.' "

The decision from which the above quotation has been taken considered an action to recover under a War Risk insurance policy. The Government contended that the court was without jurisdiction because the claimant had not secured a rating from the Veterans' Bureau, which, by the terms of Section 306, was a condition precedent to recovery in the courts. It was held that as no timely objection to the court's jurisdiction had been made on such ground the jurisdictional point had been waived and recovery was allowed.

We submit that that decision is authority for our position here. Here as there the court had general jurisdiction of the parties and subject-matter, and timely and specific objections were not made to the jurisdiction of the court. Hence, the point was waived, the court had jurisdiction and recovery should be allowed.

Concluding this section of the argument we urge that:

1. The petition is not defective for failure to allege arbitrary or capricious action;

2. If the petition is defective the point was waived by failure to make a timely and specific objection;

3. The decision of the Circuit Court that the petition is defective for failure to allege arbitrariness and capriciousness is in conflict with the general rules announced by the same Circuit Court in U. S. *v.* Edwards, 23 Fed. (2d) 477, 479, quoted *supra,* and by this Court in Beyer *v.* Le Fevre, 186 U. S. 114-118, quoted *supra.*

II.

The second contention of the petitioner is that this controversy involves a claim arising under a contract of insurance, and, hence, falls within the purview of Section 19 of the War Risk Insurance Act.

Said Section 19 (43 Stat. 1302) reads thus:

> "In the event of disagreement as to claim a contract of insurance between the Bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies."

In this connection we direct the attention of the Court to that part of Section 2 which grants to the

Director general power to administer under the Act, but which gives him the right to decide all questions arising under this Act "except as otherwise provided herein". We submit that there can be no question but that the quoted phrase means that the decision of the Director shall not be binding on cases which are justiciable under Section 19.

The Circuit Court held that this case does not fall within the provisions of Section 19 for the reason that it was not a claim arising under a contract of insurance, but rather was the creation of a new contract. We must respectfully disagree with the announced opinion of the Circuit Court. Our position is that a reinstatement in this case is merely the exercise of rights given by the old contract, and can neither logically nor legally be treated as the creation of a new contract.

Reinstatement can be effected only pursuant to the terms of the original contract of insurance. Its very existence depends on the provisions of the original contract. There is no new agreement. A new contract is not created. To the contrary a right is exercised which is given by, and enforceable under, the original insurance contract. Surely the claim to such a right is a claim under a contract of insurance, for without the contract it is impossible for there to be any right to reinstatement.

It is well established that the War Risk Insurance Act, amendments thereto and all Veterans' Bureau's rules and regulations become a part of the original contracts of insurance issued by the Veterans' Bureau.

As said by Mr. Justice Holmes in White *v.* United States, 270 U. S. 175, 180:

> "The certificate of insurance provided in terms that it should be 'subject in all respects to the provisions of such Act (of 1917), of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the act, shall constitute the contract'. These words must be taken to embrace changes in the law no less than changes in the regulations."

See also Helmholtz *v.* Horst, 294 Fed. 417.

We know of no federal decision bearing directly on the question presented here. It is true that Judge Van Valkenburgh in Stevens *v.* U. S., 29 Fed. (2d) 904 (opinion filed Dec. 14, 1928), stated that reinstatement brought into existence a new contract. This statement is pure *dicta* in that case, the decision in which was based upon a question of estoppel, and does not imply that a claim of a right to reinstate is not a claim under the old contract of insurance.

There being, then, no applicable decisions involving War Risk insurance we desire to call the attention of the Court to decisions bearing upon the question of the reinstatement of commercial insurance, feeling that we are justified in doing so under the principle thus stated in Jensen *v.* U. S., 29 Fed. (2d) 951, 952 (Adv. Sheets, Feb. 21, 1929):

> "It is suggested that since war risk insurance differs from commercial life insurance in that

> it is insurance against both death and total disability and may be reinstated at a time when the insured is suffering from service connected temporary total disability, the rule applicable to commercial insurance is not controlling, in the constructions of Section 307 of the World War Veterans' Act. But war risk insurance is not a gratuity but a contract between the insured and the Government, and the rights of the parties are to be ascertained from the terms of their contract."

See also Standard Oil Co. *v.* U. S., 267 U. S. 76, 79.

In the case of Ætna Life Insurance Company *v.* Dunken, 266 U. S. 389, there was considered the question as to whether a term life insurance policy issued in Tennessee to a citizen of that state, but thereafter converted in Texas after the insured had moved to Texas, should be construed under the laws of Tennessee, Texas or Connecticut, the domicile of the insurance company. The question hinged on whether or not the converted policy was an independent agreement, or whether or not it was the mere exercising of a right under the original contract. Mr. Justice Sutherland, speaking for the court, said:

> "Whether a subsequent contract made in pursuance of the provisions of an earlier one is to be regarded as separate, detached, and independent, or as a continuation and in effect the same, is a matter not always free from difficulty."

The court then discusses at length the decisions of various state courts and concludes thus:

> "The second policy here was issued in pursuance of, and was dependent for its existence and its terms upon, the express provisions of the contract contained in the first one. By those provisions, upon the simple application of the insured, the new policy must issue. Nothing was left to future agreement. The terms of the new policy were fixed when the original policy was made. In effect, it is as though the first policy had provided that, upon demand of the insured and payment of the stipulated increase in premiums, that policy should, automatically, become a twenty-payment life commercial policy. It was issued not as the result of any new negotiation or agreement, but in discharge of pre-existing obligations. It merely fulfilled promises then outstanding, and did not arise from new or additional promises. The result, in legal contemplation, was not a novation, but the consummation of an alternative specifically accorded by, and enforceable in virtue of, the original contract."

It is our contention that the situation presented in the case at bar is analogous, because in our case, as in the Dunken case, reinstatement was made in pursuance of, and was dependent for its existence and its terms upon, the express provisions of the original contract.

Attention is further directed to the case of Knights Templars', etc., *v.* Jacobus, 80 Fed. 202, where it was held that the reinstatement of a lapsed policy was in

fact the revival of the original policy and not the creation of a new contract of insurance.

In the case of Equitable Life Assurance Co. *v.* McElroy, 83 Fed. 631, it was held that reinstatement as brought about in the situation there before the court was the creation of a new contract. We wish to point out, however, that in that case the reinstatement was not done under the terms, nor was it dependent for existence upon the express provisions, of the original contract, but to the contrary the reinstatement was a new and independent contract.

In case of Wastun *v.* Lincoln Nat. Life Ins Co., 12 Fed. (2d) 422, the court considered an action on a life insurance policy which had been reinstated after it had lapsed for failure to pay premiums. The court held on the authority of the McElroy case that the reinstatement was a new contract. Here also a new agreement was entered into between the parties at the time of the attempted reinstatement of the policy.

On the other hand, it has been held that the reinstatement of a lapsed policy does not create a new contract of insurance, but simply restores the old contract. In Business Men's Assur. Co. of America *v.* Scott, 17 Fed. (2d) 4, 6, it was said that:

> "The defendant contends that the reinstatement was not a restoration of the old policy in full force and effect, but was a new contract, and that, that contract not having been in force for a full year, the insurer was not precluded from setting up the defense of suicide. We cannot agree with this contention. The payment of the premium after the due date did not create

a new contract of insurance and had the effect simply of restoring the old contract."

Turning to the text writers and state courts we find that the rule for which we contend is uniformly adopted and upheld.

It is said in 3 Cooley, Briefs on Law of Insurance, 2406, that:

> "The effect of a reinstatement is not, generally, the making of a new contract but it merely cancels the forfeiture, leaving the original contract in force."

37 *C. J.* 502 states that:

> "Under the general rule it is generally held that a reinstatement of the policy after default in the payment of premiums by performance of conditions specified in the policy continues in force the original policy, and does not create a new one."

14 R. C. L. 990 states the rule thus:

> "Where a revival of a forfeited life policy is assented to, the original contract is reinstated with all its terms and the new terms expressed in the application for revival."

This rule so announced by the text-book writers is supported by the following decisions:

New York Mutual Life Ins. Co. *v.* Lovejoy, 203 Ala. 542; 83 So. 591.

Monohan *v.* Fidelity Mutual Life Ins. Co., 242 Ill. 488; 90 N. E. 213.

Goodwin *v.* Provident Sav. Life Assurance Assn., 97 Ia. 226; 66 N. W. 157.

State Mutual Life Ins. Co. *v.* Rosenberry, 213 S. W. 242 (Texas).

Muckler *v.* Life Association, 208 N. W. 787 (S. D.).

Winder Nat. Bank *v.* Ætna Life Ins. Co., 36 Ga. Ap. 703; 137 S. E. 848.

New York Life Ins. Co. *v.* Adams, 151 Ark. 123; 235 S. W. 412.

Davidson *v.* Old Peoples' Mutual Benefit Society, 39 Minn. 303; 39 N. W. 803.

Lovick *v.* Providence Life Ann., 110 N. C. 93; 14 S. E. 506.

Metropolitan Life Ins. Co. *v.* McTague, 49 N. J. L. 587; 9 Atl. 766.

It is our earnest contention that under the rule so well established by the judicial authorities cited above, this action is one brought under the original contract of insurance, and, hence, comes within the purview of Section 19. As we have repeatedly pointed out herein, the test laid down by the Supreme Court of the United States in the Dunken case is a determination of whether or not a second policy was issued in pursuance of, and dependent for its existence and its terms upon, the expressed provisions of the first contract. Such is undeniably the case here. The complaint alleges that Meadows had a contract of War Risk insurance; that a portion of it lapsed; that pursuant to the statutory provisions, which we have pointed out

was a part of the insurance contract, Meadows sought to reinstate. The terms of the new policy were fixed when the original policy was made. Nothing was left for any future agreement. The answer does not set forth that any new policy would have been issued to Meadows, nor that the contract of insurance would have been in any way changed by the reinstatement. If a new contract was to have been made, or a new agreement entered into, we feel that such facts should have been set up in the answer. Without such facts there is nothing to show that there would have been any new policy, contract or agreement; hence, this dispute in the final analysis is a disagreement between the two parties under the rights given under the old original contract, and is clearly within the purview of Section 19.

We submit then that a controversy such as this is justiciable under Section 19, as it is a claim under a contract of insurance, and that the decision of the Circuit Court holding otherwise should be reviewed by certiorari because the point is an important one affecting many holders of War Risk insurance policies, and because the decision of the Circuit Court is in conflict with the principles announced in the decision of this Court in Ætna Life Ins. Co. *v.* Dunken, *supra*.

Conclusion.

Briefly summarized our contentions are:

1. The trial court had full jurisdiction to determine this cause, and its judgment for the petitioner should be upheld.

2. The decision of the Circuit Court that the trial court had no jurisdiction over this cause for the reason that the petition failed to allege the action of the Director of the Veterans' Bureau in denying the application, was arbitrary and capricious, is erroneous for the reasons that the allegations of the petitioner are sufficient, and that the respondent has waived the right to take advantage of the defect, if there is any, by failure to make timely and specific objection in the trial court.

3. The decision of the Circuit Court that this case does not fall within the terms of Section 19 is erroneous for the reason that a claim of a right to reinstate a lapsed portion of War Risk insurance policy is a claim under a contract of insurance within the purview of that section.

We therefore submit the judgment of the Circuit Court of Appeals is erroneous and a writ of certiorari should be issued herein to the end that said judgment should be reviewed, and on final hearing reversed.

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